IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 103.

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON,
Petitioners,

v.

THE UNITED STATES.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Albert F. Conn, Robert D. Flynt and Willie E. Nelson, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled causes.

Opinion Below.

The opinion of the Court of Claims (R. 19-61) is reported in 107 C. Cls. 422 and also in 68 F. Supp. 966.

Jurisdiction.

The judgment of the Court of Claims was entered on December 2, 1946 (R. 61). Motion for new trial was overruled on March 3, 1947 (R. 61) and the petition herein for the writ was filed in less than three months after said date. This petition for rehearing is filed in due time. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Statement.

The petitioners who were civilian employees of the War Department seek to recover overtime compensation at one and one-half times the regular rate because of overtime employment. The petitioners were Civil Service employees in the War Department with salaries fixed on an annual basis and during the periods of the claims for overtime compensation held positions as civilian firefighters at the U. S. Army Air Base at Gulfport, Mississippi.

During the periods of the claims the petitioners worked under a regular scheduled tour of duty, as fixed by the War Department, which consisted of 24 hours on duty (6 p.m. to 6 p.m. the following day) followed by 24 hours off duty, averaging 84 hours of duty per administrative workweek. They were on actual duty during the entire 24 hours each alternate day.

The petitioner, Albert F. Conn, claims overtime compensation under Senate Joint Resolution No. 170, approved December 22, 1942 (Public Law No. 821, 56 Stat. 1068) for overtime employment during the period December 1, 1942 to May 1, 1943, and under the War Overtime Pay Act of 1943 (57 Stat. 75) for overtime employment during the period from May 1, 1943 to June 30, 1943, inclusive, and from July 1, 1944 to June 30, 1945, inclusive. The petitioners Robert D. Flynt and Willie E. Nelson each claim overtime compensation under the War Overtime Pay Act of 1943 for overtime employment during the period from July 1, 1944 to and including June 30, 1945.

Prior to January 1, 1945 the War Department erroneously classified the petitioners as employees whose hours of duty were intermittent or irregular, paying only 10 per cent of the base pay in lieu of overtime compensation under Senate Joint Resolution No. 170, and $300.00 per annum or 15 per cent of base pay, whichever was higher, in lieu of overtime compensation under the War Overtime Pay Act of 1943, but commencing January 1, 1945 the War Department corrected its erroneous classification, paying overtime compensation at one and one-half times the regular rate for 16 hours of overtime per administrative workweek.

If the petitioners are entitled to overtime compensation for the periods of their claims prior to January 1, 1945 on the same basis as that used by the War Department for the period from January 1, 1945 to June 30, 1945, i.e., 16 hours employment time during each 24 hours, excluding 8 hours designated for rest and meals, without deduction for leave, etc., the net amounts due the petitioners after deducting the amounts paid in lieu of overtime compensation are as follows: Albert F. Conn $590.82 (Finding 23 (e), R. 44); Robert D. Flynt $236.00 (Finding 24 (e), R. 46); and Willie E. Nelson $262.40 (Finding 25 (e), R. 47).

If the petitioners are entitled to overtime compensation for all hours of duty in excess of 40 hours per administrative workweek, the net amounts due are shown in the Findings (Findings 23 (c), 24 (c), and 25 (c)).

The questions presented, statutes involved, and specification of errors to be urged are set forth in the original petition which is made a part hereof by reference.

Reasons for Granting the Writ.

1. This case involves Federal questions of substance and importance in the administration of the Federal Overtime Pay Acts having general application to Government employees, and there are special and important reasons for the settlement of such questions by a decision of this Court.

In the Government's brief filed with the Court of Claims in the instant cases, it is stated in part as follows:

> The questions presented here are of widespread importance, there now being thirty-four cases involving similar claims pending in this court, and approximately 30,000 employees of the War Department alone who are potential claimants.

Additional cases have been filed with the Court of Claims, and there are presently pending before the District Courts of the United States at Philadelphia, Pa., St. Louis, Mo., Memphis, Tenn., and Norfolk, Va., a substantial number of similar cases.

The Government is urging before the District Courts that such Courts do not have jurisdiction in suits by civilian firefighters of the Government for overtime compensation because the statute denies to the District Courts jurisdiction of cases brought to recover fees, salary, or compensation by officers of the United States. (Jud. Code Sec. 24(20), 28 U. S. C. A. Sec. 41(20); Act July 2, 1942, 56 Stat. 611, 619; Act July 1, 1943, 57 Stat. 347, 356.)

In *Claud W. Owens* v. *U. S.*, Civil Action No. 354-M, involving a claim of a civilian firefighter of the Government for overtime compensation before the District Court of the United States for the Middle District of Alabama, the Government's motion to dismiss the complaint for lack of jurisdiction was granted. District Judge Kennamer, who delivered the opinion of the Court, stated in part as follows:

> The plaintiff invokes the jurisdiction of this court under section 41, subdivision 20, of the United States Code Annotated.
>
> The defendant, United States of America, by the United States Attorney for this district, filed its motion to dismiss the said cause out of this court for lack of jurisdiction, averring that suit is for fees, salary, or for compensation for official services of officers of the United States, as is prohibited in subdivision 20 of said section.

> Oral argument on the motion to dismiss was heard by the court, and certain documentary evidence exhibited to the court, from which the court finds that this plaintiff and others were employed by authority of the Secretary of War, after being found to possess proper qualifications as the result of a Civil Service examination as fire fighters, a position authorized by the Secretary of War. The plaintiff was appointed at a stated annual salary and subscribed to the usual oath of office.
>
> It appears to this court that this case, as made out by plaintiff's complaint and the evidence before the court, comes clearly within the decision of the United States Circuit Court of Appeals, 5th Circuit, in the case of Kennedy v. United States, 146 Federal (2nd), page 26.
>
> It is, therefore, ordered, adjudged and decreed that the motion to dismiss the said complaint is granted, and said complaint is dismissed, and the plaintiff is taxed with the cost in this suit, for which execution may issue.

In *Kennedy* v. *U. S.* (C. C. A. 5), 146 F. 2d 26, affirming 54 F. Supp. 446, it was held that a junior instructor of shop mathematics of the Air Corps at Large was an "officer of the United States", and therefore could not maintain a suit in the District Court for compensation.

There are presently pending before the Court of Claims about 66 cases from Alabama involving overtime pay of civilian firefighters.

If the Government's view that the District Courts do not have jurisdiction of suits by civilian firefighters of the Government for overtime compensation is correct, a conflict of decision by the Circuit Courts of Appeal of the United States is not possible.

In *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, Mr. Justice Stone, who delivered the opinion of the Court, stated in part as follows:

> Petition for certiorari raising the question, among others, whether the Court of Appeals had erred in hold-

ing patentable a combination including one element not described in the original application for the Gulick patent and later added to it by amendment, and not described at all in the Maynard patent, was at first denied, there being no conflict of decision. 303 Ct. 609. We later granted certiorari in 304 U. S. 587, 82 L. ed. 1548, 58 S. ct. 1052, 1053, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Cf. Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464, 79 L. ed. 997, 55 S. Ct. 449; Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U. S. 477, 79 L. ed. 1005, 55 S. Ct. 455.

The above mentioned decision is referred to in the order of this Court dated October 13, 1947, amending Rule 33, REHEARING.

In view of the jurisdictional situation which exists and the widespread importance of the questions presented affecting civilian firefighters of the Government in various parts of the country, it is respectfully submitted that the entire controversy should be settled by an affirmative decision of this Court. This Court has granted certiorari to the Court of Claims in other overtime pay cases involving Government employees. *U. S.* v. *Meyers*, 320 U. S. 561; *U. S.* v. *Townsley*, 323 U. S. 557.

2. The opinion of the Court of Claims in denying overtime compensation at one and one-half times the regular rate for the periods prior to January 1, 1945 is in direct conflict with the opinion of this Court in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, both decided December 4, 1944, which recognized the propriety of overtime compensation for overtime employment of firefighters under the Fair Labor Standards Act. That Act provided for overtime compensation at a rate not less than one and one-half times the regular rate for employment in excess of the hours specified therein.

The Acts applicable to the instant cases provide for overtime compensation at a rate of one and one-half times the regular rate for employment in excess of forty hours in any administrative workweek.

After this Court announced its decision in *Armour & Co.* v. *Wantock* and *Skidmore* v. *Swift & Co.*, supra, the Civil Service Commission adopted amendments to include within the admnistrative work-week, for overtime pay or compensatory time-off purposes, all stand-by or on-call time in a regular scheduled tour of duty, except that allowed by departmental or agency regulation for sleep and meals. It was therein explained that:

> This is in accord with two recent decisions of the Supreme Court of the United States dealing with a similar situation in industry under the Fair Labor Standards Act. *Armour and Co.* v. *Wantock and Smith; Skidmore* v. *Swift and Co.;* both decided December 4, 1944. (R. 35)

The War Department, effective January 1, 1945, conformably with the amendments made by the Civil Service Commission, established an average workweek of 56 hours for firefighters who were on duty 24 hours and off 24 duty hours, and paid time and one-half the regular rate for 16 hours per administrative workweek. The scheduled tour of duty for the firefighters for the periods prior to January 1, 1945 was in all respects the same as the tour of duty after that date.

At no time during the periods covered by the claims involved herein were the hours of duty of either of the petitioners intermittent, irregular or less than full time. The classification of the petitioners as intermittent or irregular employees in the period prior to January 1, 1945 was in conflict with the law, and this was corrected effective January 1, 1945 to accord with the law. When the petitioners were on duty 48 hours per week, they received time and one-half for the extra 8 hours, and when their hours of duty were increased to an average of 84 hours per week,

they received no increase in pay because of such increased hours in the period prior to January 1, 1945. This was unfair and unjust and contrary to the intent of the Federal Overtime Pay Acts. The amounts paid in lieu of overtime compensation in the periods prior to January 1, 1945 were actually less than time and one-half for the extra 8 hours. The policy of Congress to pay overtime compensation for overtime employment cannot be thwarted by orders or regulations which are inconsistent with the intent of the law, and give employees something less than that contemplated by the applicable Acts. The petitioners were improperly classified prior to January 1, 1945 as employees whose hours of duty are intermittent or irregular. This was simply an erroneous conclusion when it is considered that the petitioners' hours of duty were regularly, uniformly and consistently 24 hours on duty each alternate day during the periods in question. The working conditions of the firefighters here were in no sense comparable with those of forest-fire lookouts, forest guards, and lighthouse keepers, who were classified as intermittent or irregular employees.

3. The opinion of the Court of Claims in denying overtime compensation at one and one-half times the regular rate for the periods prior to January 1, 1945 is in direct conflict with *Rokey* v. *Day & Zimmerman* (C. C. A. 8), 157 F. 2d 734, decided November 8, 1946; *Bowers* v. *Remington Rand* (C. C. A.), 159 F. 2d 114, decided December 10, 1946, and *Bell* v. *Porter* (C. C. A.), 159 F. 2d 117, decided December 10, 1946, in each of which cases the firefighters were paid for 16 hours of each 24 consecutive hours on duty, excluding 8 hours designated for rest and meals. The Government in the cases under consideration here did not pay the petitioners for 16 hours of each 24 consecutive hours on duty for the period prior to January 1, 1945.

The petitioners here only received approximately the following hourly rates for the hours of duty in excess of 40 per administrative workweek:

Period	Hours of duty in excess of 40 hours	Credit for Amount Paid	Hourly Rate of Overtime Compensation
Petitioner Albert F. Cona			
Dec. 1, 1942 to Dec. 31, 1942	137	$ 12.50	$ .09
Jan. 1, 1943 to June 30, 1943	1,076	84.00	.08
July 1, 1944 to Dec. 31, 1944	901½	153.00	.17
Jan. 1, 1945 to June 30, 1945	964	454.92	.47
Petitioner Robert D. Flynt			
July 1, 1944 to October 15, 1944	514	87.50	.17
Oct. 16, 1944 to Dec. 31, 1944	351	62.50	.18
Jan. 1, 1945 to June 30, 1945	1,069	402.96	.38
Petitioner Willie E. Nelson			
July 1, 1944 to Dec. 31, 1944	770	150.00	.19
Jan. 1, 1945 to June 30, 1945	960	402.96	.42

There is no substantial difference between the cases here and those decided under the Fair Labor Standards Act, except that here the petitioners were required to perform substantial duties during the so-called rest period, they were not permitted to indulge in recreational activities such as cards, games, etc., as the firefighters in the aforesaid decided cases had a right to do, and they were only permitted to rest during the so-called rest period when there was an opportunity to rest.

Conclusion.

In view of the above, it is respectfully submitted that the questions presented should be settled by a per curiam decision of this Court, or after oral argument, and to this end it is prayed that the writ be granted.

Respectfully submitted,

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November, 1947.

Certificate of Counsel.

I, Frederick Schwertner, attorney for petitioners, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FREDERICK SCHWERTNER.